UNITED STATES OF AMERICA

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References to the record are made using the following citation forms and abbreviations:

ID - Initial Decision Page

IDF - Initial Decision Finding

CCAB - Complaint Counsel's Appeal Brief

CCPB - Complaint Counsel's Post-Trial Brief

CCPF - Complaint Counsel's Post-Trial Proposed Findings of Fact

CCRRFF - Complaint Counsel's Post-Trial Reply Findings of Fact and Conclusions of Law

ROB - Respondent's Answering Brief in Opposition to Complaint Counsel's Appeal

Tr. 0000 - Citations to Trial Testimony (Witness, Tr. 1234).

I. INTRODUCTION

The evidence in this case largely takes two contradictory forms: (i) contemporaneous business documents and telephone records revealing an agreement among McWane, Sigma, and Star to raise and stabilize their prices by curtailing Project Pricing, and (ii) testimony by the alleged co-conspirators recalling little, and denying all. Importantly, while the co-conspirators denied entering into a price-fixing conspiracy, they provided no alternative, benign explanation for their documents. The co-conspirators routinely could not remember and/or could not explain documents that they authored or received. CCPB163 (describing over 500 "I don't know" or "I don't remember" responses to Complaint Counsel questions). They likewise failed to remember the substance of (or provide legitimate reasons for) their numerous and suspiciously timed telephone calls with one another.

This convenient forgetfulness should not wash with the ample evidence of conspiracy. The probative value and credibility of contemporaneous documents have the "highest validity,"[1] and are superior to the co-conspirators' blanket denials and self-serving testimony. *Cf. United States v. Apple Inc.*, No. 12 Civ. 3394, slip op. at 102 (S.D.N.Y. July 10, 2013) ("While many of the trial's fact witnesses, who are employed by Apple and the Publisher Defendants were less than forthcoming, the contemporaneous documentary record was replete with admissions about their scheme."[2]). Allowing McWane's know-nothing/remember-nothing litigation strategy to succeed here would set a dangerous precedent for future antitrust cases. The Commission's *de novo* review of the Initial Decision is not only permitted but is required by law. *De novo* review

[1] *United States v. General Electric Co.*, 82 F. Supp. 753, 844 (D.N.J. 1949).

[2] *See also id.* at 43-44 n.19 ("[R]egrettably, [the witness] was not credible. The documentary record and the commercial context of the negotiations leave room for no other conclusion."); *id.* at 71-72 n.38 (crediting contemporaneous documents and testimony over subsequent self-serving trial testimony).

is especially appropriate here because the Commission is fully capable of reading and evaluating business documents that prove the conspiracy and for which McWane offers no explanation.[3]

II. LEGAL ANALYSIS

A. McWane Unlawfully Conspired With Sigma and Star to Restrain Price Competition

1. Standard for Proving a Conspiracy

Price-fixing conspiracies may be established through evidence of parallel conduct together with circumstantial evidence that tends to exclude unilateral action ("plus factors"). Circumstantial evidence, by definition, requires the fact-finder to make reasonable inferences from arguably ambiguous evidence. *E.g.*, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002)

Inc. v. Texaco, 637 F.2d 105, 116 (3d Cir. 1980); *see also Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426 (5th Cir. 1977) ("Ultimate facts generally are derived from subsidiary facts through a cause-effect reasoning process. That is, when subsidiary facts *A*, *B*, and *C* are shown to exist, then, because of the fact-finder's knowledge of the way the world works, he is able to conclude that, more likely than not, ultimate fact *X* also exists.").

A refusal to make reasonable inferences places too high a burden on Complaint Counsel, unreasonably handicaps the Commission's enforcement efforts, indulges conspirators, and is contrary to the case law. The Second Circuit recently explained:

> Requiring a plaintiff to "exclude" or "dispel" the possibility of independent action places too heavy a burden on the plaintiff. Rather, if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from all the evidence; it need not be the *only* inference.

In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 63 (2d Cir. 2012); Bcess. /P <</MCID 3 >>BDC 0.00lier

among the Publisher Defendants CEOs during the negotiations with Apple is neither unusual nor incriminating…. [T]he Publisher Defendants' ability at trial that they discussed the Apple Agreement with one another in those communications, or that those conversations occurred at

McWane's strategy was to "be consistent and follow through" with this formal communication (IDF638); until the end of 2008, McWane practiced "price discipline" and "stayed firm on pricing" (IDF864-867);

Star instructed its sales team to curtail Project Pricing (IDF686);

Star informed its customers it would no longer offer Project Pricing (IDF702-709);

Star centralized pricing authority in the hands of Mr. Minamyer to assure price discipline (IDF686);

Sigma instructed its sales team to curtail Project Pricing (IDF664, 674);

McWane's Q1 2008 Executive Report observed that Project Pricing by Sigma and Star "appears to have died down significantly" (IDF868);

McWane's Q2 Executive Report observed that Project Pricing by Sigma and Star had continued to slow (IDF870);

McWane's "price protection log" shows very few instances of Project Pricing to match Sigma or Star during Q2 and Q3 2008, the height of the conspiracy (IDF863; CCPF1047, 1450);

Star's database (for all waterworks products) shows a decline in Project Pricing from 2007 to 2008 (IDF887, 890, 892);

The Suppliers' strong financial performance during 2008 is consistent with a decline in Project Pricing (IDF865, 963, 969-970, CCPF1344-1359 (McWane); IDF977-984, CCPF1361-1369 (Star); IDF985-993, CCPF1371-1383 (Sigma));

In November 2008, Mr. Minamyer called a halt to Star's policy of curtailing Project Pricing, telling his staff to "Go get every order!!!!!" (IDF893) (thus, Star's documents bookend its period of curtailed discounting from January to November);

In late 2008, McWane also increased its Project Pricing; customers took note, "wonder[ing] where [McWane] had been" (IDF867a); [4] and

In late 2008 and Q1 2009, Project Pricing by McWane to match Sigma and Star jumped substantially (CCPF1047).

[4] McWane asserts that "customers such as Dennis Sheley from Illinois Meter" testified that McWane priced aggressively during 2008. Actually, Sheley was the only customer to so testify. IDF862.

Yes, these documents evidence instances of excessive discounting. But they are also evidence of an agreement not to discount. And Mr. Tatman's complaints about Sigma's and Star's prices indicate that excessive discounting was the exception and not the norm. (If prices were "compromised" in Florida and California, then forty-eight states' collusive pricing was holding firm.) Overall, Mr. Tatman was satisfied with the level of price discipline exhibited by Sigma and Star. In his Executive Report for the first quarter of 2008, Mr. Tatman wrote:

competition is *per se* illegal even if (contrary to the evidence here) the agreement was ineffective and cheating was rampant. *United States v. Socony-Vacuum*, 310 U.S. 150, 218-219 (1940); *United States v. Andreas*, 216 F.3d 645, 669, 679 (7th Cir. 2000) (cheating by cartel members did not disprove conspiracy claim); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 86 (2d Cir. 1999) (same); *Areeda* ¶1404.

Cheating by McWane or the other Suppliers does not disprove a conspiracy, and is not a defense to price fixing.

4. Overwhelming Plus Factor Evidence Establishes Concerted Action

Acting in parallel, McWane, Sigma, and SCI curtailed Project Pricing during 2008. Their conduct was contrary to each firm's independent (or unilateral) interest. *See* Donald S. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HE23 >wz48lFfp r-0.0062 Tw2ersTj -0.00026 0 1hTf 0c 0.0001 Tw p1TQ2est. irt.

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explicit: the strategy is headed "Desired Message to the Market and Competitors." IDF638. This is unmistakably a collusive scheme predicated on inter-firm communication.

The Suppliers later implemented the specific actions described in the Tatman Plan, including step-wise increases in published prices, a reduction in Project Pricing, centralization of pricing authority, and greater price transparency (through DIFRA). CCPF907-1571.

McWane avers that the physical documents were never shared with Sigma and Star. ROB17. McWane's error here is presuming that a copy of the McWane Plan must be discovered in the files of Star and Sigma to prove the charged conspiracy. Instead, the proof lies in the

telephone calls (the executives profess not to recall (IDF612, 623, 624, 644; CCPF 923)); (iii) later in the year, Mr. Tatman complained to Sigma about certain Project Pricing – evidencing Mr. Tatman's proclivity to discuss pricing with competitors, as well as his belief that Sigma was breaching a prior agreement (IDF922-924); (iv) in April 2009, Mr. Tatman provided assurances to Star concerning McWane's published prices, establishing a pattern of improper price communications with competitors (IDF1018); and (v) Mr. Tatman testified that he had no recollection of the April 2009 telephone call, demonstrating his propensity to disclaim or remove

viewed its response as "doing … what is right for the industry." IDF686. Sigma described its non-competitive strategy as a deliberate message to McWane. *See* IDF664; CCPF964.

For both Sigma and Star, acceptance of McWane's January 11 invitation to curtail discounting is contrary to the company's independent interests, evidences a new-found trust in competitors, and consummates the illegal agreement. McWane offers no rebuttal.

7. In December/January 2008, the Suppliers in parallel instructed sales staff to emphasize price over volume and/or centralizing pricing authority (as specified in the Tatman Plan). IDF664, 674, 686. This, as Professor Kovacic explains, is a "super plus factor," strongly indicating explicit collusion. William E. Kovacic, *et al.*,

5. McWane's Waiver Argument Is Without Merit

According to McWane, the "law of the case" doctrine dictates that Complaint Counsel has "concede[d]" that Judge Chappell's interpretation of McWane's January 11, 2008 and May 7, 2008 letters is correct. ROB34 (citing the law of the case). This is frivolous.

The law of the case doctrine simply does not bind a reviewing tribunal considering the timely appeal of a lower court's rulings. *Marseilles Hydro Power LLC v. Marseilles Land & Water Co.*, 481 F.3d 1002, 1004 (7th Cir. 2007) (doctrine "has no application to the review of rulings by a higher court"). McWane cites no case – and Complaint Counsel can find none – in which failure to argue a claim on appeal precluded the timely, concurrent appeal of related factual findings in connection with a separate, freestanding claim.

6. McWane's Published Price Announcements Were in Furtherance of the Conspiracy to Curtail Project Pricing

The centerpiece of McWane's defense is its claim that during 2008, the company acted independently ("charted its own course") on published prices. On two occasions, Sigma announced future published price increases, and Star signaled willingness to follow. McWane subsequently announced smaller future published price increases. Sigma and Star then followed McWane's lead on prices.

McWane contends that this sequence shows that McWane's strategy was not to conspire on Project Pricing, but to underprice its rivals. McWane's argument is defective for four reasons.

1. There is no legal or economic inconsistency between independent decision-making on published prices (as McWane asserts) and a conspiracy to refrain from offering discounts off the independently established published prices (as alleged in the Complaint). Complaint Counsel is not required to show a conspiracy on both the price and discounting.

An agreement to limit discounts, by itself, is *per se* illegal. *E.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980).

2. The practice of using advance price announcements to "negotiate" a consensus on published prices is a textbook and non-competitive strategy for oligopolists. Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 389-90 (2011) ("[A]dvance price announcements, which may be followed by responsive announcements and further modifications by the initiator, in as many rounds as necessary, may reduce risks attendant with changing prices, thereby fac

McWane believed that somewhat smaller published price increases reduced the incentive to cheat and thus were more conducive to stable collusion and higher transaction prices. This was not a pro-competitive strategy.

4. McWane's claim that it "underpriced" its rivals is simply untrue. McWane was issuing ***advance*** price announcements,[10] with the expectation and understanding that Sigma and Star would substantially match these announced prices ***before*** they became effective. Mr. Tatman acknowledged precisely this in the Tatman Plan. IDF638 ("I believe Sigma and Star will mimic and verbally follow any program we publish"). McWane's rivals matched McWane's announced prices before they went into effect. IDF615, 674, 702, 834-844. If McWane were interested in underpricing its rivals to gain volume, it could have announced a price reduction that was effective immediately, thereby gaining at least a short-term advantage before its rivals could respond. McWane did not pursue this strategy.

In sum, McWane's advance price announcements were a part of its collusive scheme to restrain Project Pricing; they were not an effort to underprice its rivals or to gain market share.

B. The DIFRA Information Exchange Is Unlawful Under the Rule of Reason

McWane concedes (as it must) that the DIFRA information exchange was concerted action, that collectively the participants in the DIFRA exchange (the Suppliers) had market power in the Fittings market, and that the Fittings market was structurally conducive to collusion. McWane makes its stand on the issue of actual or likely anticompetitive effects, arguing that there is no evidence that an exchange of aggregated, historical output information can facilitate collusion. ROB39-44. McWane is incorrect.

exchange can facilitate tacit or express collusion, and the contemporaneous, ordinary course business documents of the DIFRA participants, including McWane, explain that DIFRA did in fact facilitate collusion.

Collusion (tacit or express) requires that firms reach consensus on the prices to be charged and monitor adherence to those prices. *See* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 45-46 (1964). Effective monitoring deters deviation from consensus pricing. *Id.* Economic theory explains that the exchange of aggregated, historical sales data can facilitate the monitoring of adherence to consensus price levels. *See* Massimo Motta, COMPETITION POLICY: THEORY AND PRACTICE 150-151 (2004). In the absence of such an information exchange, and in a market such as Fittings where many transaction prices are non-public, each market participant knows with confidence only its own sales volume. A decline in sales volume might mean that rivals are secretly deviating from consensus prices; it might also mean that demand is soft market wide. Left unresolved, this uncertainty puts a downward bias on price. The exchange of sales volumes resolves this uncertainty by allowing participants to calculate their own market share and use changes in that share to detect cheating by rivals. *Id.* By facilitating monitoring of rivals' adherence to published prices, exchanges of sales data can give firms confidence to experiment with higher prices. *Id.*; *see also* George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439, 463-65 (1982).

This is exactly how the Suppliers used the DIFRA information exchange. The record is replete with instances of McWane using the DIFRA data to monitor rivals' price levels. IDF783, 779; CCPF1244-1245; Tatman Tr. 538 (share loss revealed in DIFRA data informed McWane that "we obviously must be getting beat on price again"). In fact, McWane now admits that it used the DIFRA data to detect discounting. RQB40 (In June 2008, McWane "interpreted a

perceived reduction in its own market share as being the result of price competition from other Suppliers."). Similarly, Sigma's President explained how DIFRA "helped maintain the pricing discipline" by allowing each firm to resolve uncertainty posed by sharply declining sales – exactly as predicted by the economic literature. DF768-772. This evidence flatly refutes McWane's claim that the DIFRA exchange was "incapable of facilitating price collusion" and "did not (and could not) have any impact on pricing decisions." ROB40-41.

Understandably reluctant to engage with this evidence of how DIFRA facilitated collusion ***in fact***, McWane claims instead that the aggregated and retrospective nature of the information exchanged makes such an outcome unlikely ***in theory***. ROB42. McWane's argument is flawed. Courts recognize that the exchange of such data among a limited number of firms can facilitate price coordination by enabling firms to monitor rivals' adherence to consensus price levels. *See Todd v. Exxon*, 275 F. 3d 191, 212 (2d Cir. 1991) (aggregated, retrospective data reducible to subsets consisting of three competitors (the "Job Family Survey") allegedly used to monitor rivals' adherence to announced pricing actions was capable of facilitating collusion); *Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119, 166-68 (D.D.C. 2004) (same conclusion for subset of five competitors). The efficacy of the type of data exchanged must be considered in light of the collusive problem to be solved by the information exchange. Hay, *Oligopoly*, 67 CORNELL L. REV. at 463. If cartel formation is at issue, then prospective information would be useful. If monitoring collusion (tacit or express) is the goal, as here, then retrospective data is essential.

McWane advances one efficiency rationale for DIFRA: it claims to have used DIFRA data to sharpen competition in 2008 when it took a price ***increase*** after detecting discounting by its rivals. ROB40. McWane is confusing two very different concepts: detecting rivals'

discounting in order to better pursue collusion (an anticompetitive effect), and detecting rivals' discounting in order to conform one's own price to the prevailing market price (an efficiency justification). McWane's use of the DIFRA data in June 2008 falls into the first category. McWane believed that the large published price increase sought by Sigma and Star was counter-productive in light of the prevailing level of discounting, refused to support that increase, and proposed a smaller one conducive to higher, collusive, and more stable transaction prices. IDF804-805. This is a textbook example of using information exchange to facilitate stable collusion. *See* CCPF1305 (McWane believed that "DIFRA will eventually add some increased stability" to the Fittings market.). If McWane had been making an efficient, output expanding use of the DIFRA data (detecting discounting in order to conform to market price), McWane would have *lowered* its price to conform to the market price rather than taken a price increase.

Although an information exchange can certainly serve legitimate purposes, McWane has failed to identify any efficiency applicable to DIFRA. The fact that the exchange arose during a period of (at least) tacit collusion, and was disbanded when Star began to compete more aggressively in November 2008, confirms that there was no procompetitive rationale. *McWane*, 2012 FTC LEXIS 155, at *49.

C. Dr. Normann's "Data Analysis" Was Grossly Flawed

McWane recites and relies upon the testimony of its economic expert, Dr. Normann. Complaint Counsel's Appeal Brief (and Dr. Schumann's rebuttal expert report) established that Dr. Normann; (i) analyzed invoice data without taking into account the price information date; (ii) relied on data that was laden with other nonsystematic errors; (iii) failed to control for relevant market factors; and (iv) failed to assess the statistical significance of his findings. For all these reasons, the conclusions are unscientific and unreliable. *See Apple*, slip op. at 122 n.61 (rejecting

expert opinion not supported by scientifically sound analysis). McWane does not dispute, rebut, or comment upon any of the foregoing.

To illustrate these errors, below we address in greater detail Dr. Normann's conclusion that McWane's "price variation" was higher during 2008 than in other years.

1. Dr. Normann's Price Variation Anal

products, resulting in missing data. Normann, Tr. 5372-5375. He also did not know if there were data entries where the multipliers for McWane were incorrect or missing. Normann, Tr. 5371-5372; *see also* CCPF1424-1432; CCRRFF189 (detailing problems with incorrect and missing multipliers). Dr. Normann also did not report or testify about what percentage of Fittings these top three products represent.

In addition, Dr. Normann's Figure 4 analysis is meaningless because his statistical methodologies are unreliable. He did not report any measure of mean standard deviation or the coefficient of variation (or any other measure that indicates the extent of variation relative to the mean of the population) for any product for any period. Normann, Tr. 5368-5370. He did not report whether the mean coefficients of variation for different time-periods differed systematically, and he did not report any hypothesis testing or confidence intervals. Normann, Tr. 5370-5375. Without these measures and these tests, one cannot conclude that the standard deviations are statistically different from one period to the next, thus rendering the analysis meaningless.

2. Dr. Normann's Data Analysis When Applied to the Correct Period Is Consistent with Collusion

If taken at face value and applied to the correct time period (February through October 2008), Dr. Normann's analysis ***shows a price increase*** during the conspiracy period. Dr. Norman's analysis shows that McWane's price increased during the conspiracy period by { }%, Sigma's by { }%, and Star's by { }%. IDF943.

Dr. Normann's analysis was limited to his calculations using the flawed data; he never spoke with anyone at McWane and he ignored McWane's contemporaneous business records. He conveniently ignored McWane's own financial records demonstrating increasing prices in

pound realization" and price increases, respectively. Normann, Tr. 5767-5776; CCRRFF189. These contemporaneous, ordinary course of business documents, contrary to Dr. Normann's opinion, establish that {

}. CCPF1356-1357; *see also* CCPF1343-1359 (McWane's gross profits also increased in 2008 over 2007, despite reduced volume).

III. CONCLUSION

McWane should be adjudged liable under Count I (price fixing) and Count II (anticompetitive information exchange).

Dated: July 12, 2013

Respectfully submitted,

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